INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Argument	5
Conclusion	11
Appendix	13

TABLE OF CITATIONS

Cases:

Continental Oil Co., Docket Nos. G–6946 and 6949, *et al.*, order issued January 4, 1956	3
Continental Oil Co., 29 FPC 525, 15 FPC 1650	4
J. M. Huber Corporation v. *Federal Power Commission*, 236 F. 2d 550, certiorari denied, 352 U.S. 971	7
Sun Oil Co. v. *Federal Power Commission*, 364 U.S. 170	6
Sunray Mid-Continent Oil Co. v. *Federal Power Commission*, 364 U.S. 137	6, 7, 8, 9
Thompson v. *Texas Mexican R. Co.*, 328 U.S. 134	8
United Gas Pipe Line Company, 14 FPC 582	3, 8
United Gas Pipe Line Co. v. *Memphis Light, Gas and Water Division*, 358 U.S. 103	9
United Gas Pipe Line Co. v. *Mobile Gas Corp.*, 350 U.S. 332	9

206-431—66——1

Statutes and regulations:

	Page
Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821–833, as amended, 15 U.S.C. 717–717w	13
Section 1(b), 15 U.S.C. 717(b)	2, 5, 13
Section 4, 15 U.S.C. 717c	2, 13
Section 5, 15 U.S.C. 717d	2
Section 7, 15 U.S.C. 717f	2
Section 7(b), 15 U.S.C. 717f(b)	5, 6, 7, 9, 10, 16
Section 16, 15 U.S.C. 717o	2, 17
Section 19, 15 U.S.C. 717r	2
Section 19(b), 15 U.S.C. 717r(b)	17
Federal Power Commission Rules of Practice and Procedure, Section 2.56, as amended, 18 C.F.R. (Cum. Supp. 1965) 2.56 Statement of General Policy No. 61–1, 24 FPC 818	4, 7
Fourth Amendment to Statement of General Policy, 26 FPC 661	4, 7

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 870

UNITED GAS PIPE LINE COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION AND
CONTINENTAL OIL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a–22a) is reported at 350 F. 2d 689. The opinions and orders of the Federal Power Commission are reported at 31 FPC 1079 and 32 FPC 8.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1965. A petition for rehearing was denied on October 8, 1965. The petition for a writ of certiorari was filed on January 3, 1966. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and

Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether Section 7(b) of the Natural Gas Act required petitioner, a purchaser and transporter of natural gas sold in interstate commerce for resale, to obtain Federal Power Commission approval of its plan to discontinue purchases at the conclusion of a ten-year sales agreement.

2. Whether the Commission could require petitioner to continue purchasing gas at the filed rate pending the filing of an abandonment application under Section 7(b) and decision thereon.

STATUTES INVOLVED

The relevant portions of Sections 1, 4, 5, 7, 16 and 19 of the Natural Gas Act (15 U.S.C. 717a *et seq.*) are set forth in the Appendix hereto, pp. 13–19, *infra*.

STATEMENT

On January 22, 1953, Continental Oil Company ("Continental") and United Gas Pipe Line Company ("United") executed a contract for the sale and purchase of gas from the Johnson Bayou Field in Cameron Parish, Louisiana (R. 181). The contract provided for a primary term of ten years, to continue in effect thereafter on an annual basis, unless either party chose to terminate upon 90 days' notice (R. 196). From and after January 31, 1958, the contract

called for a price of 8.9970 cents per Mcf plus tax reimbursement (R. 195).[1]

The Johnson Bayou Field is adjacent to United's 16-inch Mud Lake transmission line, which extends westward from Southwest Louisiana into the Beaumont, Texas, area. Continental agreed to deliver the gas here involved to a central point near this previously constructed line. To permit delivery, Continental constructed 4,400 feet of 2½-inch line, two separators and several storage tanks, while United constructed a separator, a meter station, about 55 feet of 4-inch line and valves.[2]

On October 23, 1962, pursuant to the contract, Continental advised United that it chose to terminate the contract at the end of the primary term, i.e., on January 31, 1963 (R. 397). After attempts to negotiate a new contract had failed, Continental filed with the Commission a supplement to its existing rate schedule providing for a unilateral increase in price to 14 cents per Mcf plus 1.75 cents for tax reimbursement, which it proposed to make effective on January 31, 1963 (R. 397–398).

United objected to the filing on the ground that Continental had no authority to make such a uni-

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[1] On January 4, 1956, the Commission issued Continental a certificate of public convenience and necessity authorizing the sale and the continued operation of any jurisdictional facilities used to make the sale. *Continental Oil Company*, Docket Nos. G–6946 and 6949, *et al.*, order issued January 4, 1956. See 15 FPC 1650.

[2] On February 25, 1955, the Commission issued a certificate for United's continued transportation of gas from the Johnson Bayou Field and the operation of the facilities used for such transportation. *United Gas Pipe Line Co.*, 14 FPC 582.

lateral change. The Commission, however, accepted the increased rate filing since it was not above the area guideline price for increased rates, which was then, as now, 14¢ plus tax reimbursement.[3] The increased rate was not suspended, and United's application for rehearing was denied. *Continental Oil Co.*, 29 FPC 525. United did not seek judicial review of that order.

United thereafter notified Continental that purchases from the Johnson Bayou Field would cease as of 7:00 a.m., January 31, 1963 (R. 251, 398). On February 1, Continental petitioned the Commission to direct United "* * * to show cause why it should not be required to continue to take deliveries of gas produced by Continental in the Johnson Bayou Field * * * at the currently filed and effective rate" and to order United to take such gas during the pendency of such action (R. 242, 398). The Commission directed United to show cause "why it should not be required to apply for and obtain the permission and approval of the Federal Power Commission before ceasing the operation of all or any portion of the facilities heretofore operated by United to purchase natural gas from Continental * * *" (R. 267–271, 398–399).

[3] The Southern Louisiana guideline price announced on October 25, 1960, for initial (new) service was 21.5¢ exclusive of tax reimbursement. This was changed on October 31, 1961, to 21.25¢ inclusive of State taxes. Fourth Amendment to Statement of General Policy No. 61–1, 26 FPC 661. The guideline price for rate changes has, since September 28, 1960, remain fixed at 14¢ exclusive of tax reimbursement of 1.75¢. Statement of General Policy No. 61–1, 24 FPC 818.

After a full hearing, intermediate decision and argument, the Commission held that United's intention not to use, for an indeterminate time, the facilities for the purchase of gas from Continental constituted an abandonment within the meaning of Section 7(b) of the Natural Gas Act. Accordingly, it required United to resume purchasing gas consistently with Continental's filed rate schedule (R. 407, 408). The court of appeals sustained the Commission's order.

ARGUMENT

1. The court of appeals correctly sustained the Commission's conclusion that United was required by Section 7(b) of the Natural Gas Act to obtain Commission approval before it could discontinue its purchases from Continental. The Commission found that in terminating its purchases, United had abandoned "jurisdictional gas purchasing facilities" (R. 396, 407–408) that had been "constructed and operated by United for the sole purpose of receiving Continental's Johnson Bayou Field gas" and were "concededly facilities used for the 'transportation of natural gas in interstate commerce' within Section 1(b)" (R. 396, n. 1). Although Section 1(b) does not explicitly bring within the Commission's regulatory power the purchase of natural gas, it does give the Commission authority over "transportation of natural gas in interstate commerce." United was engaged in such transportation, and to the extent that it wished to terminate this phase of its operations it was required to obtain Commission approval.

The Commission's construction of Section 7(b) does

not conflict with *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137. Indeed, the reasons of policy stated by this Court in support of its decision in *Sunray* and in *Sun Oil Co.* v. *Federal Power Commission*, 364 U.S. 170, affirmatively support the result reached here. For to allow United to abandon its purchase and transportation of natural gas without Commission authorization would effectively prevent Continental's continued sale of its gas to the public, with the same "damaging effect * * * upon the policies of the Act" that the Court noted in reaching its decision in *Sunray*. See 364 U.S. at 141–142. The interstate market would be deprived of this supply of gas from Continental's reserves without the prescribed Commission finding "that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment." Section 7(b), pp. 16–17, *infra*. As in *Sunray*, the consequence would be that "the consumer ultimately would pay the bill for the rearrangement" of services as between the gas producer and another pipeline. 364 U.S. at 143.

In addition, unregulated termination by United of its arrangement with Continental would have other serious "practical consequences" on consumers—quite like the producer's termination in *Sunray*. See 364 U.S. at 147. If United were freely permitted to terminate its purchases, new purchases that might be re-

quired to make up for those abandoned would be made at new-gas prices, which are normally higher.[4]

The fact that United was not required to obtain a certificate of public convenience and necessity to purchase gas does not, as petitioner contends (Pet. 9), entitle it to discontinue the purchase and transportation as soon as its contractual obligation terminates. Relying on *J. M. Huber Corporation* v. *Federal Power Commission*, 236 F. 2d 550 (C.A. 3), certiorari denied, 352 U.S. 971, the Commission held that even without such a certificate, United's facilities are "'dedicated to the public use and cannot be abandoned absent a showing under Section 7(b)'" (R. 399, n. 5). The abandonment provision is not, by its terms, limited to those holding certificates, and the policy of the Act extends to pipelines like United whether or not they possess certificates. This position is not inconsistent with this Court's assumption in *Sunray* that a limited-time certificate would permit a producer to discontinue its operations at the certificate's expiration. In that case, the Court assumed only that approval of such a limitation amounted to an authorization under Section 7(b)

[4] Thus, while United was declining to take gas from Continental at the 15.75¢ guideline price (14.0¢ plus 1.75¢ tax reimbursement) for changed rates in the Southern Louisiana area involved (see Federal Power Commission Rules of Practice and Procedure, § 2.56, 18 C.F.R. (1961 revision, 1965 Supp.) § 2.56; 24 FPC 818 and 26 FPC 661), the record shows it entered into some new purchases of gas at prices ranging between 18¢ and 19.75¢ (R. 23–27, 330). There are indications that these purchases were not made to compensate for the termination of the supply from Continental (*ibid.*), but this, of course, would be something that could be more fully developed in an abandonment proceeding initiated by United.

206-431—66——2

to abandon the certificated service at the conclusion of the certificated period.[5]

In any event, although the Commission did not rely on the terms of any certificate, United had, in fact, obtained a certificate on February 25, 1955, for the "continued transportation of natural gas" over the facilities involved here. FPC Docket No. G–2818, 14 FPC 582.

In terms of the comprehensive purposes of the Natural Gas Act, the Commission's ruling obviously effectuates a desirable symmetry between the obligations of sellers and purchasers subject to the Commission's jurisdiction. United's obligation not to terminate its purchase arrangements without Commission approval is the correlative of Continental's obligation not to cut off the source of supply. In analogous circumstances, this Court construed the abandonment provisions of the Interstate Commerce Act to apply not merely to a carrier conducting the operations which were to be terminated but also to the property owner over whose facilities the carrier was conducting such operations. *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, 144–145.

2. Since United was required to obtain Commission approval before abandoning its purchase ar-

[5] Nor does this Court's reference in *Sunray* to the seller's continuing obligation in that case to deliver gas to the purchaser "on the latter's request" (364 U.S. at 155) support petitioner's argument that a purchaser is free to abandon his purchases at any time (Pet. 9). We believe that that statement, in context, referred to the purchaser's right, under the particular contract involved in *Sunray*, to call for an additional supply of gas up to 150 percent of the specified annual amount. 364 U.S. at 139.

rangement with Continental, the Commission was entirely justified in requiring United to continue its purchases at the outstanding lawful rate while an application for abandonment, if any were filed, was being considered and determined. United objected to the rate filed by Continental only on the ground that it was unauthorized and not because it was unjust, unreasonable or discriminatory. It did not ask that the rate be suspended or that it be collected subject to refund. Having been filed and not having been suspended by the Commission, Continental's rate became the lawful rate, and United was required to abide by it until it received abandonment authorization under Section 7(b).

Nothing said by this Court in *United Gas Pipe Line Co.* v. *Mobile Gas Corp.*, 350 U.S. 332, is to the contrary. Before any agreement is entered into, sellers and buyers may, of course, negotiate as to price, and the seller has no power beyond that of an offeror; he may set his price and then seek out "prospective customers." 350 U.S. at 343. But this Court noted in both *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103, and in *Sunray, supra,* that if a contract authorizes the filing of a new rate *ex parte* or if the contract term expires, the seller may make rate changes without the purchaser's consent. See 358 U.S. at 112–113; 364 U.S. at 155. The purchaser, of course, is not left without rate protection. If the seller attempts to raise his rate, the purchaser may attack it as unjust, unreasonable, discriminatory or preferential, and may seek to have it suspended or collected subject to

refund. Alternatively, a purchaser may request permission under Section 7(b) to discontinue the seller's gas. United invoked none of these remedies, but chose instead to attack the rate filing as impermissible under the Act. The Commission properly rejected that course.

Finally, we do not believe that the present decision will have a significant impact upon the price of gas to the pipelines or ultimate consumers. Many purchase contracts have already expired, but the present case appears to be the first in which the parties have failed to reach a further agreement upon the expiration of the initial contract term. If producers do file higher rates at the expiration of contract periods, pipelines and their customers may be protected from undue increases by the Commission's power (1) to suspend the rates, and, after the expiration of the statutory suspension period, to order refunds with interest on any excessive amounts collected, and (2) to authorize the pipeline to abandon its facilities if it can demonstrate that its gas needs can be met from cheaper sources.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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FEBRUARY 1966.

APPENDIX

The Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821–833, as amended, 15 U.S.C. 717–717w provides in pertinent parts:

SEC. 1. * * *

* * * * *

(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

* * * * *

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or

(2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint,

at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission

shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * *

SEC. 7. * * *

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted,

or that the present or future public convenience or necessity permit such abandonment.

* * * * * *

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this Act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [52 Stat. 830 (1938); 15 U.S.C. § 717o]

* * * * * *

SEC. 19. * * *

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Ap-

peals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judg-

ment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28 [sec. 1254]).

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